

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**OHIO VALLEY ENVIRONMENTAL
COALITION, INC., et al.,**

Plaintiffs,

v.

**Case No. 2:13-cv-21588
(Consolidated with 2:13-cv-16044)**

FOLA COAL COMPANY, LLC,

Defendant.

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In this case, Plaintiffs allege that Fola Coal Company, LLC (“Fola”) is violating the Clean Water Act (“CWA”) by its discharges of “conductivity” from its sediment control ponds. They claim that Fola’s discharges of conductivity are violating West Virginia’s “narrative water quality standards” by virtue of their impact on the types and proportions of aquatic insects that appear in the stream reaches downstream of Fola’s ponds. Specifically, they claim that the narrative standard itself is an “effluent standard or limitation” enforceable under the citizen suit provision of the CWA and that compliance with the standard is measured by applying the “West Virginia Stream Condition Index” (“WVSCI”). Ultimately, Plaintiffs claim that conductivity discharged by Fola is causing failing WVSCI scores and ask this Court to restrict the levels of conductivity Fola may discharge.

This case is of enormous significance, not only to Fola and the coal industry generally, but also to the State of West Virginia. Plaintiffs’ claims seek to cast aside the State’s implementation of its own CWA permitting program and impose upon the regulated community

obligations neither required by the CWA nor intended by the West Virginia Department of Environmental Protection (“WVDEP”). Plaintiffs advance their claims despite the fact that: conductivity is not a “pollutant” subject to regulation by the CWA or Fola’s NPDES permits; WVDEP has declined, with approval of the West Virginia Supreme Court, to adopt a water quality standard for conductivity; WVDEP has rejected the WVSCI as a rigid measure of compliance with the narrative standard absent rulemaking approval; WVDEP has declined to impose effluent limits on conductivity or sulfate on Fola’s discharges; and Plaintiffs have declined to challenge the conditions of Fola’s NPDES permits despite having done so in other cases. Plaintiffs’ vision of the NPDES permitting and enforcement scheme upends West Virginia’s CWA regulatory program.

In approving NPDES permits, WVDEP establishes effluent limits for a permit applicant’s discharges that, in the agency’s expert judgment, will meet State water quality standards. Permittees are then charged with meeting those express and custom-designed limits. Plaintiffs’ conception of the NPDES program shoves the permit process aside, substitutes water quality standards for site-specific effluent limits, and casts the federal courts as the new permitting and enforcement agencies.

That view of the program destroys the certainty that the NPDES program was created to ensure. It means that permit holders cannot rely on the site-specific limits devised for them by WVDEP. It means that the site-specific effluent limits in a permit are meaningless, and that the permit holder, despite complying with all of the limits imposed by the State, is subject to civil and criminal penalties and to new limits devised by a federal court. That was not the intent of Congress when it passed the CWA, and it exceeds the scope of the federally-enforceable State NPDES program. Likewise, Plaintiffs attempt to enforce the same standards through the Surface

Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. §§ 1231-1328. However, SMCRA expressly prohibits that result. Despite its prior rulings,¹ this Court should reject Plaintiffs’ claims and grant Fola’s motion for summary judgment.

II. FACTUAL BACKGROUND

Fola holds permits for three inactive surface mines in Clay County, West Virginia, located within the Leatherwood Creek watershed—Surface Mine No. 2, Surface Mine No. 4A, and Surface Mine No. 6. Leatherwood Creek is a tributary of the Elk River. Each of these mines is governed by a West Virginia/National Pollutant Discharge Elimination System (“WV/NPDES”) permit and a West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) permit issued by WVDEP. *See generally, Ohio Valley Env’tl. Coal., Inc. v. Aracoma Coal Co.*, 566 F.3d 177, 189-90 (4th Cir. 2009) (describing surface mining and NPDES programs).

WVDEP issued the surface mining permit for Surface Mine No. 2 (WVSCMRA Permit No. S201293) in 1994. Discharges of effluent from Surface Mine No. 2 are regulated by WV/NPDES Permit No. WV1013840, which WVDEP also issued in 1994. Of the eighteen outlets listed in this NPDES permit, one is at issue in this case—Outlet 001, which discharges into Road Fork of Leatherwood Creek. WVDEP reissued WV1013840 in 2001, 2004, 2008, and

¹ This Court has previously considered variations of Plaintiffs’ claims in other cases. *See Ohio Valley Env’tl. Coal., Inc., et al. v. Marfork Coal Co., Inc., et al.*, 966 F.Supp.2d 667 (S.D.W.Va. 2013); *Ohio Valley Env’tl. Coal., Inc., et al. v. Fola Coal Company, LLC*, No. 2:12-cv-3750, 2013 WL 6709957 (S.D.W.Va. Dec. 19, 2013); *Ohio Valley Env’tl. Coal., Inc., et al. v. Alex Energy, Inc., et al.*, 12 F.Supp.3d 844 (S.D.W.Va. 2014); *Ohio Valley Env’tl. Coal., Inc. v. CONSOL of Kentucky, Inc.*, 2:13-cv-5005, 2014 WL 1761938 (S.D.W.Va. Apr. 30, 2014); *Ohio Valley Env’tl. Coal., Inc., et al. v. Elk Run Coal Co., Inc., et al.*, 3:12-cv-0785, 2014 WL 29562 (S.D.W.Va. Jan. 3, 2014); *Ohio Valley Env’tl. Coal., Inc., et al. v. Elk Run Coal Co., Inc., et al.*, No. 3:12-cv-0785, 2014 WL 2526569 (S.D.W.Va. June 4, 2014); *Ohio Valley Env’tl. Coal., Inc., et al. v. Fola Coal Co., LLC*, No. 2:13-cv-5006, 2015 WL 362643 (S.D.W.Va. Jan. 27, 2015). Some of these cases involved numeric water quality standards for selenium rather than narrative water quality standards, but were based on similar legal claims as advanced by Plaintiffs here.

2014. The NPDES permit in effect when Plaintiffs filed their Complaint was the 2008 reissuance. *See* Exhibit 1 (WV/NPDES Permit No. WV1013840).

WVDEP issued the surface mining permit for Surface Mine No. 4A (WVSCMRA Permit No. S200502) in 2003. Discharges of effluent from Surface Mine No. 4A are regulated by WV/NPDES Permit No. WV1013815, which WVDEP issued in 1993. Of the twenty-five outlets listed in this NPDES permit, four are at issue in this case—Outlets 022, 023, 025, and 027, which discharge into Right Fork (Outlets 022 and 025), Rocklick Fork (Outlet 023), and Cannel Coal Hollow (Outlet 027). WVDEP reissued WV1013815 in 1999, 2006, 2008, and 2014. The NPDES permit in effect at the time Plaintiffs filed their Complaint in this action was the 2008 reissuance. *See* Exhibit 2 (WV/NPDES Permit No. WV1013815).

WVDEP issued the surface mining permit for Surface Mine No. 6 (WVSCMRA Permit No. S201199) in 2000. Discharges of effluent from Surface Mine No. 6 are regulated by WV/NPDES Permit No. WV1018001, which WVDEP also issued in 2000. Of the twenty-four outlets listed in this NPDES permit, three are at issue in this case—Outlets 013, 015, and 017, which all discharge into an unnamed tributary of Leatherwood Creek known as Cogar Hollow. WVDEP reissued WV1018001 in 2008, and this 2008 reissuance is the NPDES permit that was in effect at the time Plaintiffs filed their Complaints in this action.² *See* Exhibit 3 (WV/NPDES Permit No. WV1018001).

In its applications for reissuance of each of the three NPDES permits, Fola provided WVDEP with all of the information required under the State’s NPDES permitting rules. *See* W. Va. Code R. §§ 47-30-4.5.a and 4.5.b. This included information regarding “effluent characteristics”—sampling data for specified pollutants at each outlet covered by the permits, as

² An application for reissuance of WV1018001 is currently pending before WVDEP.

required by W. Va. Code R. § 47-30-4.5.b.1. *See* Exhibit 4 (excerpts of Fola’s applications for reissuance). Plaintiffs’ Complaints cite extensive sulfate and conductivity data, as well as biological assessment information, which were available to WVDEP when it reissued Fola’s permits. ECF No. 39 at ¶¶ 35-37, 40; ECF No. 26-2 at ¶¶ 34-36, 38, 40, 47-48, 51. With this information, WVDEP did not impose effluent limits on conductivity or sulfate in the 2008 reissuances.

III. LEGAL BACKGROUND

A. Clean Water Act

1. Water Quality Standards and Development of Site-Specific Effluent Limits in NPDES Permits

The Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1387, prohibits the discharge of pollutants from “point sources” (discrete conveyances such as pipes and outlets from ponds) into “waters of the United States,” except as authorized by an NPDES permit. 33 U.S.C. §§ 1311(a) & 1342. The U.S. Environmental Protection Agency (“EPA”) oversees the CWA’s NPDES program, but EPA may authorize individual states to administer their own NPDES programs. 33 U.S.C. § 1342(b). West Virginia has been authorized to administer its own NPDES program since 1982. 47 Fed. Reg. 22,363 (May 24, 1982). WVDEP administers the state’s NPDES program through the West Virginia Water Pollution Control Act. W. Va. Code §§ 22-11-1 to -30. *See also* W. Va. Code R. §§ 47-30-1 to -15 (NPDES permit rules for coal industry). EPA’s role is merely one of oversight.

Congress announced in the CWA its express “policy...to recognize, preserve and protect the primary rights of States to [control] pollution and [the] use...of land and water resources[.]” 33 U.S.C. § 1251(b). To that end, the CWA recognizes the primary authority of the states (not EPA) to adopt and administer “water quality standards,” which consist of recognized stream uses

(such as public water supply or support of aquatic life) and maximum amounts of individual pollutants, or narrative descriptions of conditions allowed in those streams, to maintain those uses (called “criteria”). 33 U.S.C. § 1313(a); 40 C.F.R. § 131.4(a). Thereafter, EPA reviews and approves water quality standards that meet certain minimum standards. 40 C.F.R. § 131.6. Water quality standards apply in-stream—they are the goal that site-specific effluent limits imposed on discharges are designed to achieve.

Water quality standards are issued by WVDEP and come in two forms: numeric and narrative. *See* W. Va. Code § 22-11-7b (authorizing WVDEP to issue water quality standards). “Numeric” standards consist of allowable concentrations of specific pollutants (such as 1.5 mg/l of iron in streams supporting warm water aquatic life). West Virginia’s numeric standards appear at W. Va. Code R. § 47-2-8.1, Appendix E, Table 1. “Narrative” standards are statements that describe conditions that must be maintained in water bodies in order to protect their uses. West Virginia’s narrative standards appear at W. Va. Code R. § 47-2-3 (“Conditions not allowable in state waters”).

West Virginia has not adopted numeric water quality criteria for conductivity or sulfate, nor do any of the state’s narrative water quality standards make any reference to conductivity or sulfate. Indeed, as discussed below, WVDEP has determined that the correlation between conductivity and any measure of compliance with the narrative standards is too tenuous to warrant the adoption of a conductivity standard. *See infra* pp. 9-10. The narrative water quality criteria that Plaintiffs allege Defendant is violating provide that:

3.2. No sewage, industrial wastes or other wastes present in any of the waters of the state shall cause therein or materially contribute to any of the following conditions thereof:

[...]

3.2.e. Materials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life;

[...]

3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

W. Va. Code R. §§ 47-2-3.2.e & 3.2.i. These narrative standards are not further defined in any statute or regulation.

Water quality standards apply to the State's waters, not to discharges into those waters. As such, they are not self-implementing; they are protected through the imposition of "effluent limits" in NPDES permits. 33 U.S.C. § 1311. Once a state has adopted water quality standards, NPDES permit limits must be established on a case-by-case basis to assure compliance with those standards. *Westvaco Corp. v. U.S. Env'tl. Prot. Agency*, 899 F.2d 1383, 1384 (4th Cir. 1990). As one court has said: "[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits." *Am. Paper Inst., Inc. v. U.S. Env'tl. Prot. Agency*, 996 F.2d 346, 350 (D.C. Cir. 1993).

WVDEP's NPDES rules require applicants for new and renewed permits to submit information characterizing the expected or actual quality of their discharges. W. Va. Code R. §§ 47-30-4.5.a & 4.5.b. Using this information, WVDEP's permit writers must develop site-specific "effluent limitations" to ensure that the discharges will not cause violations of water quality standards in the receiving streams. W. Va. Code R. § 47-30-6.2.c. For numeric water quality standards, the permitting authority examines baseline data on flow volumes and pollutant concentrations in the receiving stream and similar information for existing or proposed

discharges into those streams. It then determines what effluent limits are needed to ensure that the concentrations of discharged pollutants do not cause in-stream concentrations of pollutants to exceed numeric water quality standards in the receiving streams.

For narrative water quality standards, the process is not so straightforward. The standards themselves are impossibly general. *See* W. Va. Code R. § 47-2-3.2. In 2002, WVDEP started using the “West Virginia Stream Condition Index” (“WVSCI”) as the determinant of compliance with the narrative standards related to aquatic life for purposes of making attainment decisions pursuant to Section 303(d) of the CWA. *See* Exhibit 5 at 5 (*The Impacts of Mountaintop Removal Coal Mining on Water Quality in Appalachia: Hearing Before the Subcomm. on Water and Wildlife of the S. Comm. on Envt. and Public Works*, 111th Cong. (2009) (statement of Randy Huffman, Secretary, West Virginia Department of Environmental Protection)). The WVSCI relies exclusively on the types, numbers and proportions of certain aquatic insects in undisturbed “reference” streams as the template against which insects in an assessed stream are measured. *See* A Stream Condition Index for West Virginia Wadeable Streams, available at http://www.dep.wv.gov/WWE/watershed/bio_fish/Documents/WVSCI.pdf (last accessed Mar. 19, 2015). However, a low WVSCI score provides no information about which pollutant might be responsible—or even whether the cause is related to a pollutant at all.³

Commencing around 2006, Plaintiffs began claiming that the levels of “conductivity” in streams affected by mining were depressing WVSCI scores and causing violations of the narrative water quality standards. *See, e.g., Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers*, 479 F.Supp.2d 607, 637 (S.D.W.Va. 2007), *rev’d*, 566 F.3d 177 (4th Cir. 2009)

³ This Court has previously noted that a finding of biological impairment does not include an analysis of the causal basis of impairment and that WVSCI scores can be adversely affected by land disturbances that do not result in point source discharges of pollutants. *See* Exhibit 24 (excerpt of Transcript of Motion Hearing, *Ohio Valley Envtl. Coal., Inc., et al. v. U.S. Army Corps of Engineers, et al.*, No. 3:11-cv-0149 (S.D.W.Va. Apr. 26, 2012)).

(discussing claims about conductivity). Since then, however, both the State Legislature and WVDEP have rejected the use of the WVSCI as an appropriate measure of compliance with the narrative standards.

In 2009, WVDEP Secretary Huffman testified before a Congressional subcommittee and observed that while WVDEP has used the WVSCI since 2002, it alone does not establish a violation of the narrative standards. Ex. 5 at 5. He concluded that “[w]ithout evidence of any significant impact on the rest of the ecosystem beyond the diminished numbers of certain genus of mayflies, the State cannot say there has been a violation of its narrative standard.” *Id.* WVDEP reiterated this policy in a letter to the U.S. Army Corps of Engineers in July 2009:

The WVDEP understands that [EPA] found a shift in the benthic macroinvertebrate community downstream from mining activity but did not otherwise correlate this finding with any significant or adverse impairment of the ecosystem. Where the only impacts to this component of the ecosystem are diminished numbers of certain genera of mayflies, without evidence that this has had any adverse impact of any significance on the rest of the ecosystem, the State cannot say there has been a violation of its narrative standards.

Ex. 6 at 3.

Subsequently, WVDEP examined the correlation between conductivity and WVSCI scores over a broad range of conductivity levels and determined that the correlation was relatively poor—that conductivity levels over a broad range were a relatively poor predictor of WVSCI scores. *See* Ex. 7 at 5-7 (WVDEP Justification and Background for Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia’s Narrative Water Quality Standards, 47 CSR 2 §§ 3.2.e and 3.2.i) (“Justification Document”) (“[I]t is infeasible to calculate a numeric effluent limit to implement a narrative water quality standard[.]”). Accordingly, WVDEP declined to develop a water quality criterion for conductivity. *Id.* It also rejected the use of the WVSCI alone to assess compliance with the narrative standard, stating

that “[WV]DEP has determined that ‘significant adverse impact’ [in the narrative standard] is more than a change in the numbers or makeup of the benthic macroinvertebrate community in a segment of a water body downstream from a point source discharge.” *Id.* at 3. Thus, WVDEP concluded, “compliance [with the narrative standard] ... must be assessed in the broader area comprising the ecosystem. An ecosystem does not exist at a single point and, accordingly, health cannot be assessed at a single point.” *Id.* The West Virginia Supreme Court has endorsed WVDEP’s policy decision. *See Sierra Club v. Patriot Mining Co., Inc.*, No. 13-0256, 2014 WL 2404299 at *5-7 (W.Va. May 30, 2014) (affirming WVDEP’s decision not to conduct “reasonable potential” analyses or impose effluent limits on conductivity or sulfate because there was no scientific consensus about appropriate thresholds).

In 2010, the State Legislature passed a resolution declaring that the narrative standards are met when there are sufficient aquatic insects to support fish, and that WVDEP is the entity responsible for interpreting and applying the narrative standards. H.D. Con. Res. 111, 79th Leg., 2d Reg. Sess. (W.Va. 2010). In 2012, the Legislature spoke again and directed WVDEP to adopt rules recognizing that the narrative standards exist to protect aquatic insects only to the extent that they support fish populations. S.B. 562, 80th Leg., 2d Reg. Sess. (W.Va. 2012) (now codified at W. Va. Code § 22-11-7b(f)). WVDEP also embraced this concept.

Regardless of whether the target is a numeric or narrative standard, once WVDEP develops site-specific effluent limits to protect water quality standards, the water quality standards themselves are not enforceable—the effluent limits are. *Sierra Club v. ICG Hazard*, No. 11-148-GFVT, 2012 WL 4601012 at *12-14 (E.D.Ky. Sept. 28, 2012), *aff’d*, No. 13-5086, 2015 WL 643382 (6th Cir. Jan. 27, 2015) (“Effluent limitations and water quality standards are undoubtedly distinct concepts. [...] Once an NPDES permit has been issued, assuming a

discharger complies with the permit's requirements, water quality standards lose their importance, at least for a case against a discharger.”). Put another way, once WVDEP develops effluent limits to protect water quality standards, the water quality standards themselves effectively “drop out.” *Id.* at *14.

In West Virginia, any citizen who believes WVDEP has not imposed effluent limitations that are sufficiently stringent to protect water quality standards may submit comments to that effect to WVDEP and then appeal the NPDES permit to the West Virginia Environmental Quality Board (“EQB”) after it is issued. *See* W. Va. Code § 22-11-21; W. Va. Code R. § 47-30-10.2. Decisions of the EQB may be appealed to the Circuit Court of Kanawha County and then to the West Virginia Supreme Court of Appeals. W. Va. Code § 22B-1-9. Plaintiffs have never challenged any of Fola’s NPDES permits based on WVDEP’s decision not to impose effluent limits on conductivity or sulfate, despite having done so in other cases involving mining-related discharges. *See, e.g., Sierra Club v. Patriot Mining Co., Inc.*, No. 13-0256, 2014 WL 2404299 (W. Va. May 30, 2014) (affirming WVDEP’s decision not to impose limits on conductivity or sulfate).

2. The CWA’s Permit Shield

Although NPDES permits limit dischargers, compliance with effluent limits “enables dischargers to utilize the permit shield at 33 U.S.C. § 1342(k).” *ICG Hazard* at *3 (E.D.Ky. Sept. 28, 2012), *aff’d*, No. 13-5086, 2015 WL 643382 (6th Cir. Jan. 27, 2015). Section 402(k) of the CWA “shields” dischargers from liability in citizen suits and government enforcement actions if they are complying with their NPDES permits. 33 U.S.C. §§ 1365(a) and 1342(k). Section 402(k) provides that:

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 1319 [§ 309:

government enforcement actions] and 1365 [§ 505: citizen suits] of this title, with sections 1311 [§ 301: effluent limitations], 1312 [§ 302: water quality based effluent limitations], 1316, 1317, and 1343 of this title[.]

33 U.S.C. § 1342(k). The U.S. Supreme Court has observed that “[t]he purpose of s[ection] 402(k) seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, s[ection] 402(k) serves the purpose of giving permits finality.” *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28 (1977). As stated by EPA when it issued its final regulation regarding the permit shield:

This “shield” provision is one of the central features of EPA’s attempt to provide permittees with maximum certainty during the fixed terms of their permits.

45 Fed. Reg. 33,290, 33,311 (May 19, 1980) (originally promulgated at 40 C.F.R. § 122.13, now found at 40 C.F.R. § 122.5). A permit shield provision is a required component of an approved state NPDES permitting program, and West Virginia has had a permit shield provision since the beginning of the State’s NPDES program. 40 C.F.R. § 123.25(a)(2); W. Va. Code R. § 47-30-3.4.a.

Courts, including the Fourth Circuit, have consistently held that the permit shield protects permittees from claims that they are violating the CWA by discharging pollutants that are not expressly identified and limited in their permits when the discharge of the pollutant giving rise to the enforcement action was within the reasonable contemplation of the permitting authority at the time the permits were issued. *Piney Run Pres. Ass’n v. Cnty. Commr’s of Carroll Cnty., Md.*, 268 F.3d 255 (4th Cir. 2001). *See also Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994); *Sierra Club v. ICG Hazard, LLC*, No. 13-5086, 2015 WL 643382 (6th Cir. Jan. 2, 2015). In *Piney Run*, the Fourth Circuit deferred to EPA policy concerning the scope of

the protection it provides. 268 F.3d at 268 (deferring to EPA's reasonable interpretation of the scope of Section 402(k)).

Pursuant to that policy, where a permit applicant supplies the required application information about the nature of its discharges, the CWA places the burden on the permitting authority to ensure that water quality standards are protected by imposing adequate permit limits, not on the discharger to ensure that its discharges do not cause a violation of water quality standards. An NPDES permit holder may discharge pollutants not expressly mentioned in its permit, as long as it complies with the CWA's reporting and disclosure requirements and the permitting authority reasonably anticipates that those pollutants will be discharged. *Piney Run*, 268 F.3d at 268.

Here, though, Plaintiffs claim that a single citation to a rule placed in the fine print in the back of all coal-related NPDES permits upsets this common understanding of the NPDES program. *See discussion infra* pp.19-21. According to Plaintiffs, this boilerplate provision converts all of the State's water quality standards into enforceable effluent limits regardless of the site-specific limits developed by WVDEP. Plaintiffs claim that this provision allows them to skip a permit challenge, sue Fola for a violation of the "narrative standards," and seek judicially-imposed limits on conductivity and sulfate.

B. Surface Mining Control and Reclamation Act

Plaintiffs' Complaints also contain allegations that Fola's discharges violate the Surface Mining Control and Reclamation Act ("SMCRA"). SMCRA requires all entities engaged in surface mining to obtain a permit to do so. 30 U.S.C. § 1256. SMCRA is administered by the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM"). 30 U.S.C. § 1211. States that wish to assume exclusive jurisdiction, or "primacy,"

over the regulation of surface mining within their borders may do so by adopting a program consistent with SMCRA and approved by OSM. 30 U.S.C. § 1253(a). *See also Bragg v. W. Va. Coal Assoc.*, 248 F.3d 275 (4th Cir. 2001). West Virginia has had primacy over the regulation of surface mining within its borders since 1981. 46 Fed. Reg. 5,915 (Jan. 21, 1981); 30 C.F.R. pt. 948. It does so through the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) and its implementing rules. *See* W. Va. Code §§ 22-3-1 to -32a; W. Va. Code R. §§ 38-2-1 to -24.⁴

A SMCRA permit applicant must provide detailed information about the possible environmental consequences of the proposed operation, as well as assurances that damage at the site will be prevented or minimized during mining and substantially repaired after mining. *Ohio Valley Envtl. Coal., Inc. v. Aracoma Coal Co.*, 556 F.3d 177, 196 (4th Cir. 2009). Under the WVSCMRA and its implementing rules, all water that contacts areas disturbed by surface mining activities must be routed to a sediment control structure such as a pond, ditch, or sump where sediment and other potential pollutants may be controlled before the water is released. *See* W. Va. Code R. § 38-2-5. Water is released from these structures through “outlets,” which are considered “point sources” subject to the NPDES permitting program.

IV. STANDARD OF REVIEW

Summary judgment should be granted when the moving party demonstrates that there is no genuine issue as to any material fact and, based on those facts, the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When the moving party meets this burden, the non-moving party must go beyond the pleadings to identify concrete evidence upon which a

⁴ Once OSM has approved a state program, the federal provisions continue to serve as a “blueprint” against which to evaluate a state’s program, but the federal statute and rules “drop out” as operative provisions and can only be re-engaged following a proceeding to withdraw the state program. *Bragg*, 248 F.3d at 288-89.

reasonable factfinder could enter judgment in the non-moving party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986).

V. ARGUMENT

Plaintiffs advance this citizen suit under both the CWA and SMCRA. Relying on the CWA, they contend Fola is discharging conductivity and sulfate, which is causing Fola to be “in violation” of an “effluent standard or limitation.” 33 U.S.C. § 1365(a). ECF No. 39 at ¶¶ 44-50; ECF No. 26-2 at ¶¶ 55-61. The “effluent standard or limitation,” they claim, is a boilerplate condition contained in Fola’s NPDES permits that Plaintiffs claim expressly incorporates the narrative water quality standards related to aquatic life and restricts Fola’s discharges of conductivity and sulfate. In addition, Plaintiffs claim that the narrative water quality standards are enforceable under SMCRA. ECF No. 39 at ¶¶ 51- 59; ECF No. 26-2 at ¶¶ 62-71.

Plaintiffs’ claims, though, are based on an interpretation of the State’s coal mining NPDES permitting rules and narrative water quality standards that WVDEP, the WV Legislature, and the WV Supreme Court have expressly (and repeatedly) rejected. Moreover, by effectively converting narrative water quality standards into numeric effluent limits, Plaintiffs’ claims turn this Court into a permitting agency with the authority to make subjective policy determinations at odds with the CWA and WVDEP’s expressly stated policies. This is a result that Congress specifically rejected when it enacted the CWA:

Section 505 [regarding citizen suits] would not substitute a “common law” or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

S. Rep. No. 92-414 at *3745, 92d Cong., 2d Sess. (1971). *See also Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 809 F. Supp. 1040, 1046-47 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993). Plaintiffs' claims would do just what Congress sought to avoid—create a federal common law or court-developed interpretation of the State's narrative water quality standards.

A. Conductivity is Not a Pollutant that Causes Violations of Water Quality Standards, Thus it is not Subject to Regulation by the CWA or Fola's NPDES Permits

The CWA prohibits “the discharge of a pollutant” “except as in compliance with [the CWA].” 33 U.S.C. § 1311(a). Plaintiffs contend that Fola is not “in compliance” with its NPDES permits because its discharges are violating the narrative standards. The narrative standards, they claim, are effluent standards or limitations because Part C of Fola's permits incorporates W. Va. Code R. § 5.1 by reference as a permit condition. ECF No. 39 at ¶¶ 34 & 43; ECF No. 26-2 at ¶¶ 33, 43, 46, & 54.

At the time Plaintiffs filed this case, Subsection 5.1.f of the State NPDES rules provided that “discharges” are “to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 CSR 2.” W. Va. Code R. § 47-30-5.1.f. “Discharge” is defined as the “discharge of a pollutant.” W. Va. Code R. § 47-30-2.16 (emphasis added). *See also* 33 U.S.C. § 1362(16) (“discharge” means “discharge of a pollutant”). Thus, the rule on which Plaintiffs rely to convert a water quality standard into an effluent limit requires them to prove that a “pollutant” causes the violation of the water quality standard. *See Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488 (2d Cir. 2001) (CWA plaintiffs must “identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully.”).

Plaintiffs' Complaints identify “conductivity” as a pollutant causing a violation of narrative standards. ECF No. 39 at ¶ 41; ECF No. 26-2 at ¶ 41. Conductivity is the measurement

of a substance's ability to conduct an electrical current and, as such, conductivity is not a pollutant.⁵ This Court has previously ruled that to succeed on their claims, Plaintiffs must show that "the discharge of a pollutant causes or materially contributes to the violation of water quality standards." *Ohio Valley Envtl. Coal., Inc., et al. v. Fola Coal Co., LLC*, No. 2:13-cv-5006, 2014 WL 4925492 at *4 (S.D.W.Va. Sept. 30, 2014). It has also ruled that "conductivity itself is not a pollutant, but rather is a measure of ionic pollution[.]" *Id.* Plaintiffs are attempting to use conductivity as a surrogate for unidentified "pollutants," and they concede as much in their Complaints. ECF No. 39 at ¶ 47; ECF No. 26-2 at ¶ 47 (alleging Fola discharges unidentified "pollutants which cause ionic stress and biological impairment"). That conductivity is used as a surrogate, and is not itself a pollutant, is supported also by the fact that the characteristic of conductivity is not itself a cause of impacts to aquatic insects. That is, the level of electrical conductance is not the cause of impacts; rather, one or more of the specific ions that affect conductivity levels may cause impacts to aquatic insects.

EPA agrees. In 2011, it issued its conductivity "benchmark." 76 Fed. Reg. 30,938 (May 27, 2011) (announcing availability of "A Field-based Aquatic Life Benchmark for Conductivity in Appalachian Streams" ("Conductivity Benchmark")). In a report dated March 25, 2011, EPA's Science Advisory Board ("SAB") reviewed a draft of EPA's Conductivity Benchmark. There, the SAB observed that "[c]onductivity itself is not a pollutant, but is a surrogate measure for the major constituent ions in the mixture." Ex. 8 at 20 (excerpt of SAB Report).⁶ The SAB noted further that "the scientific credibility of the benchmark would be strengthened by analysis relating the constituent ions to observed biological community changes." *Id.* at 2. The following

⁵ The CWA defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

⁶ The full report is available at [http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/EEDF20B88AD4C6388525785E007331F3/\\$File/EPA-SAB-11-006-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/EEDF20B88AD4C6388525785E007331F3/$File/EPA-SAB-11-006-unsigned.pdf).

month, EPA issued the final Conductivity Benchmark without identifying the role of individual ions. Rather, EPA conceded that “conductivity per se is not the cause of toxic effects” and that “[t]his causal assessment does not attempt to identify the constituents of the mixture that account for the effects.” Ex. 9 at 26, A-40 (excerpt of EPA’s Conductivity Benchmark).⁷

Thus, as used by Plaintiffs, conductivity is a surrogate for individual substances that are pollutants, but are not named or identified themselves as the cause of any violation of the narrative standards. This is an insufficient basis for advancing a citizen suit—Plaintiffs fail to identify the “discharge of a pollutant” causing the violations they allege.

With EPA approval, WVDEP has already rejected the use of limitations on conductivity to meet narrative water quality standards in the Leatherwood Creek watershed, determining instead that there are particular pollutants and thresholds (levels of those pollutants) that must first be identified. Section 303(d) of the CWA requires states to identify waters that are not meeting the uses assigned them by state water quality standards. 33 U.S.C. § 1313(d) (describing development of list of impaired waters). States, or EPA in their absence, must then establish a total maximum daily load (“TMDL”) “for those pollutants” identified as suitable for such calculation. 33 U.S.C. § 1313(d)(1)(C). WVDEP has identified “ionic toxicity” (another term for conductivity) as a stressor for certain West Virginia streams, including Leatherwood Creek. *See* Total Maximum Daily Loads for Selected Streams in the Elk River Watershed, West Virginia at 24, available at http://www.dep.wv.gov/WWE/watershed/TMDL/grpb/Documents/Elk_TMDL_B2_2011/Elk_Approved_Docs_2012/FINAL_Approved_Elk_TMDL_Report_6_6_12.pdf.

However, WVDEP also properly determined that “there was insufficient information available regarding the causative pollutants and their associated impairment thresholds for biological TMDL development[.]” *Id.* EPA expressly approved WVDEP’s decision. Ex. 10 at 6 (EPA

⁷ The full document is available at http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=502333.

Decision Rationale, Total Maximum Daily Loads for Selected Streams in the Elk River Watershed).⁸

Even if EPA disagreed with WVDEP's interpretation of the State's narrative water quality standards, it is WVDEP that is charged with interpreting them, not EPA. 33 U.S.C. § 1313(a); 40 C.F.R. § 131.4(a). Once EPA has approved a state's water quality standards, EPA becomes merely an "interested observer" regarding how the state interprets them. *Marathon Oil Co. v. Env'tl. Prot. Agency*, 830 F.2d 1346, 1351-52 (5th Cir. 1987).

B. Defendant's NPDES Permits Do Not Limit Discharges of Pollutants Not Specifically Identified in the Permits

1. Language and Structure of NPDES Permits Do Not Support Plaintiffs' Interpretation that All Water Quality Standards are Incorporated as Express Effluent Limitations

Fola's NPDES permits do not expressly limit the levels of conductivity or sulfate in its discharges. Rather, Plaintiffs' claims rely on a boilerplate provision that appears in the back of the 2008 reissuances of the NPDES permits as follows:

⁸ Plaintiffs recently challenged EPA's approval of numerous TMDLs, including the Elk River TMDL. *See* Complaint at ¶¶ 44-47, *Ohio Valley Env'tl. Coal., Inc., et al. v. McCarthy*, No. 3:15-cv-271 (S.D.W.Va. Jan. 7, 2015) (alleging that EPA approved WVDEP's TMDLs without addressing "ionic stress").

C.	TERMS AND CONDITIONS INCORPORATED BY REFERENCE TO THE WV NPDES REGULATIONS FOR COAL MINING AND FACILITIES, TITLE 47, SERIES 30.
5.1	Duty to Comply, Penalties
5.2	Duty to Reapply
5.3	Duty to Halt or Reduce Activity
5.4	Duty to Mitigate
5.5	Proper Operation and Maintenance
5.6	Permit Actions
5.7	Transfer
5.8	Property Rights
5.9	Duty to Provide Information
5.10	Inspection and Entry
5.11	Monitoring and Records
5.12	Signatory Requirements
5.13	Reporting Requirements
5.14	Bypass
5.15	Upset
5.16	Reopener Clause
5.17	Removed Substances
5.18	New Sources (if applicable)
5.19	Definitions

Ex. 1 at 16; Ex. 2 at 13; Ex. 3 at 20. This provision refers to § 47-30-5 of West Virginia's NPDES permitting rules for coal facilities. At the time Defendant's NPDES permits were reissued in 2008, Subsection 5.1.f of that rule read as follows:

The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein. However, as provided by subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a

permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

W. Va. Code R. § 47-30-5.1.f. Plaintiffs claim that the boilerplate reference to the permitting rule in Fola's permits has the effect of converting all State water quality standards into express effluent limitations, based on the first sentence of § 5.1.f ("The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2.")).

The interpretation of an NPDES permit is a matter of law for the Court to decide. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 269 (4th Cir. 2001). Individual permit conditions should not be read in isolation; rather, the language of the permit must be interpreted in light of the structure of the permit as a whole. *Natural Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013) (language of permit to be considered in light of structure of permit as a whole) (quoting *Piney Run*, 268 F.3d at 270). A review of the other terms and conditions contained in the permits, as well as the overall organization and structure of the permits, does not support Plaintiffs' interpretation.

Fola's NPDES permits do not treat water quality standards themselves as if they are express effluent limitations on the discharges regulated by the permits. Such an interpretation is contrary to the structure and organization of the permits. Section A of the permits is titled "DISCHARGE LIMITATIONS AND MONITORING REQUIREMENTS." Ex. 1 at 3; Ex. 2 at 3; Ex. 3 at 4. Subsection A.2 of the permits establishes: "EFFLUENT LIMITATIONS AND MONITORING FREQUENCY: Outlets should be limited and monitored by the permittee as specified below." *Id.* Below this language, each outlet is listed separately, along with a list of the pollutants that are limited, the levels at which those pollutants are limited, and the frequency and

method of monitoring that is required for each pollutant identified. Ex. 1 at 3-11; Ex. 2 at 3-8; Ex. 3 at 4-15. Section A does not contain any indication at all—express or implied—that there are any additional effluent standards or limitations beyond those specifically listed in that Section.

Section A also requires Fola to submit quarterly Discharge Monitoring Reports (“DMRs”) to WVDEP “indicating the values of the constituents listed in [Section] A” as measured “at the specific compliance points.” Ex. 1 at 12; Ex. 2 at 9; Ex. 3 at 16. On those DMRs, Defendant is required to “[s]pecify the number of analyzed samples that exceed the allowable permit conditions in the columns labeled N.E. (i.e. number exceeding).” *Id.* The permits do not require Fola to report the values or number of exceedances of any additional pollutants other than those specified in Section A.

The permits also require monitoring and reporting of specified parameters in the receiving streams where the discharges occur. Pursuant to Section D of the permits, the only parameters that Defendant is required to sample in the receiving streams are the pollutants listed in Section A of the permit. Ex. 1 at 17; Ex. 2 at 14; Ex. 3 at 21. Section D does not contain any indication—express or implied—that Defendant is required to monitor or report the levels of any other pollutants beyond those specifically listed.

The purpose of the in-stream monitoring requirement is stated in Section D.3:

Based upon the stream monitoring flow data, water quality standards or other information, the Department may at any time modify the effluent limits in Section A of this permit for any of the discharge points if necessary, to insure compliance with water quality standards.

Id. This sentence clearly distinguishes between “effluent limits” and “water quality standards,” just as the CWA does. It does not make water quality standards self-enforcing. Rather, it

contemplates that if sampling data or other information indicates that the effluent limits in the permit are not sufficient to ensure compliance with water quality standards, WVDEP will modify the effluent limits in Section A of the permit. If the permit condition referencing Subsection 5.1.f incorporated all water quality standards as enforceable effluent limitations without further action, it would never be “necessary” for WVDEP to modify the effluent limits in Section A to ensure compliance with water quality standards.

Plaintiffs have previously speculated⁹ that the condition incorporating 5.1.f is intended to be a “backstop” or “failsafe” provision to ensure that water quality standards are protected in the event that the effluent limitations specified in the permit are inadequate. *See, e.g., Ohio Valley Envtl. Coal., Inc., et al. v. Marfork Coal Co., Inc.*, 966 F.Supp.2d 667, 684 (S.D.W.Va. 2013). However, the backstop is the provision in Section D.3 of the permits recognizing WVDEP’s authority to modify the effluent limits in the permit in the event such a modification proves necessary to protect water quality standards. Thus, Plaintiffs’ speculation as to the purpose of § 5.1.f only muddies, rather than clarifies, its meaning.

There is limited precedent for enforcing water quality standards through citizen suits. When Congress enacted the modern CWA in 1972, it shifted away from water quality standards to effluent limits. *Piney Run*, 268 F.3d at 264-66. Consistent with this shift, the CWA expressly allows citizens to file suits to enforce “effluent limits,” but does not expressly allow suits to enforce “water quality standards.” *See* 33 U.S.C. § 1365(f). Courts in most circuits have either expressly or implicitly held that water quality standards are not enforceable in a CWA citizen suit. *See, e.g., Save Our Community v. U.S.E.P.A.*, 971 F.2d 1155, 1162 (5th Cir. 1992) (“[W]ithout the violation of either (1) an effluent standard or limitation under the CWA, or (2) an

⁹ As discussed *infra* pp. 26-31, there is nothing in the legislative history of § 47-30-5.1 f that explains its purpose at all, let alone suggests that it was intended as a backstop. Thus, this is pure speculation on Plaintiffs’ part.

order issued with respect to these standards and limitations, the district court lacks jurisdiction to act [in a citizen suit].”); *Oregon Natural Resources Council v. U.S. Forest Serv.*, 834 F.2d 842 (9th Cir. 1987) (finding that citizens may file suit to enforce permit limitations derived from water quality standards, but not water quality standards themselves); *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 979 (2d Cir. 1984) (“Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act.”); *ICG Hazard* at **12-14, *aff’d*, No. 13-5086, 2015 WL 643382 (6th Cir. Jan. 27, 2015) (“Effluent limitations and water quality standards are undoubtedly distinct concepts. [...] Once an NPDES permit has been issued, assuming a discharger complies with the permit’s requirements, water quality standards lose their importance, at least for a case against a discharger.”).

The Ninth Circuit is the only circuit to take a different view. It has found that citizen suits may be brought to enforce water quality standards where compliance with such standards is an express condition of an NPDES permit. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 981 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 2500 (1996). Notably, the Ninth Circuit initially ruled the opposite—that a citizen suit could not be brought to enforce water quality standards. *See Northwest Envtl. Advocates v. City of Portland*, 11 F.3d 900 (9th Cir. 1993) (*vacated and withdrawn*). However, the Ninth Circuit subsequently revisited and vacated its decision (for questionable reasons, as noted in the dissenting opinion¹⁰), holding that such suits could be brought because: (1) the federal citizen suit provision at 33 U.S.C. § 1365 allows suits to be

¹⁰ The majority claimed that the U.S. Supreme Court’s decision in *PUD No. 1 of Jefferson Co. v. Washington Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900 (1994) had cast the Ninth Circuit’s original decision into doubt. 56 F.3d at 981. However, in a dissenting opinion, Judge Kleinfeld disagreed with the majority, noting that “*Jefferson County* says nothing about” the question before the court, which was “whether citizens’ suits may be brought to enforce water quality standards, as opposed to effluent limitations.” 56 F.3d at 990 (Kleinfeld, J., dissenting). *See also* Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 Ecology L.Q. 393,431 (1997) (“In reality, the court of appeals’ reliance on *PUD No. 1* was no more than a convenient explanation for its decision to alter its earlier holding in *Northwest Environmental Advocate*.”).

brought for violation of “a permit or condition thereof” and (2) the NPDES permit at issue contained a condition that provided that “notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate [Oregon’s] Water Quality Standards.” *Id.* at 986.

The Ninth Circuit rejected a petition for a rehearing en banc. *Northwest Env’tl. Advocates v. City of Portland*, 74 F.3d 945 (9th Cir. 1996). Four judges dissented from the order denying the rehearing. The dissenters contended that the new decision violated the structure of the CWA and made for bad public policy:

While state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements, they should not be used as a vehicle for flooding the federal courts with citizen suits against permittees who are meeting the specific requirements (i.e., effluent limitations) outlined in their permits.

Id. at 946.

Nevertheless, a handful of district courts have followed the Ninth Circuit’s reasoning, but only where compliance with water quality standards is an express condition of the NPDES permit. *See, e.g., New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp.2d 1326, 1336-39 (N.D.Ga. 2010); *Gill v. LDI*, 19 F. Supp.2d 1188, 1195 (W.D.Wash. 1998). Plaintiffs’ claims rely on this narrow line of cases. While the Fourth Circuit has not addressed the issue squarely, it has recognized that Congress intended the CWA to enforce effluent limits, not water quality standards, and has held that the CWA’s permit shield applies to discharges of pollutants not specifically identified in the permit—strongly suggesting that the Fourth Circuit would not follow the Ninth Circuit’s logic. *Piney Run*, 268 F.3d at 264-66.

2. Subsection 5.1.f was Never Approved to Convert Water Quality Standards into Effluent Limitations

Plaintiffs claim that the reference to § 5.1.f in Fola's NPDES permits has the effect of imposing all State water quality standards as if they were express effluent limitations. This Court has previously agreed.¹¹ However, the rule was never approved (nor has it been applied) to have such an effect. EPA approved West Virginia's original NPDES rules and granted West Virginia primacy over the NPDES program in 1982. 47 Fed. Reg. 22,363 (May 24, 1982). As originally promulgated, West Virginia's NPDES permitting rules applied to both coal and non-coal facilities, and contained a permit shield provision like the modern provision found at W. Va. Code R. § 47-30-3.4.a (coal rules) and § 47-10-3.4.a (non-coal).¹² However, those rules did not contain anything resembling the language allegedly converting water quality standards to express effluent limitations that was found in W. Va. Code R. § 47-30-5.1.f (prior to its recent removal, *see infra* pp. 33-34). *See* Ex. 11 at 5-7.

In 1984, West Virginia split its NPDES permitting rules into two sets of rules: one for coal facilities and one for non-coal facilities. This split was undertaken as part of an effort to streamline and synchronize the administrative process of obtaining SMCRA and NPDES permits for the coal industry. The final NPDES rule for coal facilities continued to include the existing permit shield provision that currently resides at W. Va. Code R. § 47-30-3.4.a,¹³ but for the first time also included language at § 10E.01(f) stating that discharges "are to be of such quality" so

¹¹ *Ohio Valley Envtl. Coal., Inc., et al. v. Marfork Coal Co., Inc.* 966 F.Supp.2d 667, 686 (S.D.W.Va. 2013) (reference to § 47-30-5.1 f "expressly impos[es] limits on pollutants which cause violations of water quality standards[.]").

¹² *See* Ex. 11 (relevant portions of W. Va. Code R. 20-5A, Series II, § 3.04(a)(1981)). The full version of the document is available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=22240&Format=PDF>.

¹³ Ex. 12 at 4 (relevant portions of W. Va. Code R. 20-6, Series VII, § 10C.04(1984)). The full version of the document is available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15239&Format=PDF>.

as not to cause a violation of water quality standards.¹⁴ Through the years, the provision at § 10E.01(f) was renumbered until it became W. Va. Code R. § 47-30-5.1.f as it appears today.¹⁵ As discussed below, however, that provision was never approved under state or federal law to have the effect of transforming all water quality standards into express effluent limitations, as Plaintiffs contend.

WVDEP's predecessor agency, the West Virginia Division of Natural Resources ("WVDNR") filed the proposed coal Article 5A/NPDES Regulations¹⁶ with the West Virginia Secretary of State on May 8, 1984.¹⁷ The Secretary of State published a notification in the West Virginia Register on May 11, 1984 that WVDNR had filed the proposed rules.¹⁸ WVDNR issued a "Notice of Public Hearing" to solicit comments on the proposed rule.¹⁹ These notices stated only that the proposed rules related to the consolidation of the State's surface mining program and water pollution control program as it relates to coal mines. *See* Ex. 13 at 1; Ex. 14 at 3; Ex. 15 at 1. They did not provide the public any notice that the State was altering the

¹⁴ Ex. 12 at 6-7 ("The effluent or effluents covered by this permit are to be of such quality so as not to cause a violation of applicable water quality standards[.]")

¹⁵ The combined coal NPDES and surface mining rules were "deconsolidated" in 1988. As part of that process, "the confusing use of the defunct section 10 designation" was changed and § 10E.01(f) became § 47-30-5.1.6. *See* Preamble for Proposed Amendments to W. Va. Code R. § 47-30 (1986), available at: <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15696&Format=PDF>. In 1996, as part of a "rule cleanup initiative," § 47-30-5.1.6 became § 47-30-5.1.f as it appears today. *See* Letter from Laidley Eli McCoy, Commissioner of W. Va. Bureau of Environment, to Judy Cooper, Director of the Secretary of State's Administrative Law Division (Dec. 18, 1996), available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=22457&Format=PDF>. Neither of these regulatory amendments provides any explanation of the origin or purpose of this provision.

¹⁶ In 1984, Article 5A referred to Chapter 20, Article 5A of the W. Va. Code, which then contained the Water Pollution Control Act—since moved to W. Va. Code § 22-11-1, *et seq.* *See* W. Va. Code § 22-11-1 (editor's notes).

¹⁷ Ex. 13 (Letter of May 8, 1984 from William H. Hertig, Jr., Chairman of WVDNR's Reclamation Commission, to A. James Manchin, Secretary of State, filing proposed regulations consolidating State's surface mining program and NPDES program for coal mines). The full document is available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15238&Format=PDF>.

¹⁸ Ex. 14 (Vol. I, Issue 49, W. Va. Register, 766, 769 (May 11, 1984)). The full document is available at <http://apps.sos.wv.gov/adlaw/register/readpdf.aspx?did=496>.

¹⁹ Ex. 15 (Press Release, WVDNR, Transfer and Consolidation of Water Pollution Control Program-Notice of Public Hearing). The full document is available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15239&Format=PDF>.

substance of the existing NPDES rules so as to convert all water quality standards into “effluent standards or limitations” enforceable in a CWA citizen suit. *Id.*

The proposed rules filed with the Secretary of State contained a Section 10C.04, entitled “Effect of a Permit,” which included the “permit shield” and provided in relevant part that “compliance with a permit during its term constitutes compliance for purposes of Sections 301, 302, 306, 307, 318, 403 and 405 of the CWA and Article 5A.” *See* Ex. 13 at 5. Importantly, though, the proposed rule did not contain a § 10E.01(f) or a requirement that all discharges meet water quality standards. *See* Ex. 13 at 6-7 (proposing §§ 10E.01(a)-(c) but no subsections (d)-(g)).

The provision purportedly requiring all discharges to meet water quality standards first appeared in § 10E.01(f) when it was filed as a final rule by WVDNR with the Secretary of State on October 18, 1984. *See* Ex. 12 at 1, 5-7. On December 4, 1984, the Legislative Rulemaking Review Committee recommended that the coal NPDES rules be authorized without change, as provided for in W. Va. Code § 29A-3-11(c)(1).²⁰ There is no explanation in the records of the Secretary of State as to how or why the additional subsection “(f)” was added between the time of the proposed and final rule and the time that it was submitted to the Legislative Rulemaking Review Committee.²¹

²⁰ Ex. 16 (relevant portions of Volume II, Issue 80, W. Va. Register (Dec. 14, 1984)). The full document is available at <http://apps.sos.wv.gov/adlaw/registers/readpdf.aspx?did=1375>.

²¹ The WVDNR also filed with the Secretary of State a “Preamble to [the] Approved Regulations.” *See* Ex. 17 (available at <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=15239&Format=PDF>). There was no mention of any intention to alter the substantive permit shield provisions already in the rules or to re-work the manner in which WVDEP derived water quality-based effluent limits. The addition of § 10E.01(f) to the final rule without notice cannot be attributed either to comments filed on the proposed rule or to action of the Legislative Rulemaking Review Committee. While the preamble filed with the final rules in November 1984 indicate that changes were made to the proposed rule to accommodate an EPA rulemaking, § 10E.01(f) is not discussed. *See* Ex. 17 at 7-27. As noted above, the Rulemaking Committee met in December 1984 and did not recommend any changes to the final rule filed by WVDNR in October 1984. *See* Ex. 16.

There was never any public notice provided that the final version of § 10E.01(f) was intended to convert water quality standards into express effluent limits. If the provision was in fact intended to do so, that failure would be a violation of the West Virginia Administrative Procedures Act. *See* W. Va. Code § 29A-3-6(a) (amendments to proposed rules must be filed in state register “with a description of any changes and a statement listing the reasons for the amendment”). Accordingly, if the rule was intended to have the meaning Plaintiffs’ contend it does, the rule never took effect as a matter of State law.

Furthermore, Plaintiffs’ construction of the provision was never properly approved under the CWA, which is evident from EPA’s treatment of the 1984 State rulemaking. As explained, EPA originally approved West Virginia’s NPDES program in 1982 without a provision purportedly requiring permits to incorporate water quality standards as effluent limits. EPA’s regulations for making revisions to an NPDES program provide that where a state program change is “substantial,” EPA must provide notice in the Federal Register and an opportunity for public comment. 40 C.F.R. § 123.62(b)(2). The public notice must also “summarize the proposed revisions.” *Id. See also Wisconsin Resources Protection Council, Center for Biological Diversity v. Flambeau Mining Co.*, 903 F.Supp.2d 690, 718 (W.D.Wisc. 2012) (holding that rule proposing to use mine permit as NPDES permit required EPA approval), *rev’d on other grounds*, 2013 WL 4106403 (7th Cir. 2013).

Likewise, the federal Administrative Procedure Act requires notice of a proposed rulemaking in the Federal Register and requires the notice to include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). The notice must be sufficiently descriptive to give interested persons a fair chance to comment and must fairly apprise them of all significant subjects and issues involved, and its

inadequacy cannot be excused even if sophisticated parties may have gleaned the impact of an otherwise improperly noticed rule. *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 777-78 (S.D.W.Va. 1996).

There can be no debate that a state rule which purports to make all water quality standards enforceable as effluent limits—despite an existing detailed permit process for converting water quality standards into effluent limits—would be a “substantial” revision to a state program.²² Yet when EPA publicly noticed and reviewed the West Virginia rule package that first contained the predecessor to W. Va. Code R. § 47-30-5.1.f, it did not describe the rule as effecting any change to the pre-existing NPDES program. After the State rulemaking, EPA issued a public notice of its tentative decision to approve the 1984 coal NPDES program and rules. 50 Fed. Reg. 2,996 (Jan. 23, 1985) (noting WVDNR issued W. Va. Code R. 20-6, Series VII, § 10 as part of the split of coal and non-coal permitting programs). There, EPA observed that “[n]o substantive rights or obligations of any person will be altered by this program modification.” *Id.* at 2,997.

EPA thereafter finalized its approval, again noting that the split of the coal and non-coal NPDES programs was undertaken “without any substantive change in [the] State regulating authorities or responsibilities.” 50 Fed. Reg. 28,202 (July 11, 1985). Thus, EPA neither understood nor provided notice that the rule had the effect Plaintiffs urge upon the Court. Without express public notice that the rule was intended to convert water quality standards to effluent limits, the construction of the rule offered by Plaintiffs could never have taken effect for the purposes of CWA enforcement. *See Cat Run*, 922 F.Supp. at 777-78 (OSM inadequately characterized state surface mining program changes); *Ohio Valley Env’tl. Coal. v. Marfork Coal*

²² Indeed, this Court has suggested that a program change which relieved a state of an existing obligation to convert all water quality standards to effluent limits would require EPA approval before becoming effective. *Ohio Valley Env’tl. Coal. v. Marfork Coal Co.*, No. 5:12-cv-1464, 2013 WL 4506175 at *12 n. 8 (S.D.W.Va. Aug. 22, 2013).

Company, No. 5:12-cv-1464, 2013 WL 4506175, at *12 n. 8 (S.D.W.Va. Aug. 22, 2013) (citing 40 C.F.R. § 123.62(b)).

3. WVDEP and West Virginia Legislature Have Expressly Rejected Plaintiffs' Interpretation of § 5.1.f

In 2012, the Legislature passed Senate Bill 615 (“SB 615”), which amended the State WPCA by clarifying that no permit condition or provision of any rule negates the scope of the permit shield with regard to discharges of pollutants that are not specifically listed in the permit. S.B. 615, 80th Leg., 2d Reg. Sess. (W. Va. 2012). In the preamble to the bill, the Legislature stated that it was “clarifying” that “compliance with effluent limits contained in a [NPDES] permit is deemed compliance with West Virginia’s Water Pollution Control Act.”²³

After the passage of SB 615, WVDEP amended the language of Subsection 5.1.f of the coal NPDES permitting rule to read as follows:

The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein. However, as provided by subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

W. Va. Code R. § 47-30-5.1.f (emphasis added).²⁴ WVDEP added the underlined language, which is the same permit shield language that already appears in Subsection 3.4.a of the rule. By adding the same permit shield language to Subsection 5.1.f, WVDEP clarified its rejection of the

²³ The preamble language is relevant where there is ambiguity. *See Slack v. Jakob*, 8 W.Va. 612, 613 (1875) (the “preamble may be consulted in some cases to ascertain the intentions of the legislature”).

²⁴ The Legislature authorized WVDEP’s amendment to the rule on April 12, 2013. *See* S.B. 243, 81st Leg., 1st Reg. Sess. (W. Va. 2013).

view that § 5.1.f “pierces” the permit shield by making water quality standards self-implementing. WVDEP later confirmed this interpretation in response to inquiries from EPA and the regulated community seeking clarification of WVDEP’s interpretation of SB 615:

[W]hen a permittee is meeting the express numeric effluent limits listed in its permit, that permittee is shielded from liability for the discharge of pollutants not expressly mentioned in the permit, provided that such pollutants were reasonably anticipated by, or within the reasonable contemplation, of the permitting authority. Moreover, DEP has consistently adhered to this interpretation, as the relevant permit shield language—which mirrors the federal permit shield provision—has long been contained in West Virginia’s coal and non-coal NPDES rules. *See* 47 C.S.R. 30 § 3.4.a and 47 C.S.R. 10 § 3.4.a. Senate Bill 615 was simply intended to clarify and confirm DEP’s long-standing understanding, *i.e.*, that West Virginia’s permit shield is entirely co-extensive with federal law.

Ex. 18 at 1 (WVDEP letter dated June 14, 2013). Thus, WVDEP interpreted SB 615 as a clarification of the longstanding understanding that NPDES permit holders are shielded from liability for discharges of pollutants that are not specifically identified in their NPDES permits. *See also* Ex. 19 at 1-2 (WVDEP letter dated June 5, 2013) (NPDES permit shields a coal mining operation for discharges of pollutants that are not specifically mentioned in the permit, so long as the mine operator complied with disclosure requirements when it applied for the permit).

WVDEP also affirmed this view in a series of letters in 2012 and 2013 to Plaintiffs’ counsel concerning operations by Fola and other mine operators. Ex. 20 (letters from WVDEP to Appalachian Mountain Advocates regarding citizen complaints). Counsel for Plaintiffs had complained to WVDEP that various mining companies, including Fola, were violating their NPDES permits because discharges from their operations were causing violations of water quality standards in the receiving streams. *Id.* at 3, 8, 13, 18, 23, 28. WVDEP responded clearly

and consistently that the reference to § 5.1.f in the mining companies' NPDES permits did not convert all water quality standards into enforceable effluent limits:

[The permit shield] has the effect of preventing the State from taking enforcement action against a permit holder for violation of water quality standards that are not embodied in effluent limitations that are expressed in a NPDES permit. [...] [The state permit shield provision] precludes [the Division of Mining and Reclamation] from issuing a notice of violation for exceedances of selenium water quality standards under WVSCMRA where a permittee is in compliance with their WV/NPDES permit. A review of Fola's WV/NPDES Permit Nos. WV1013815 & WV1017934 indicates that there are no requirements, limits or report only, for selenium for outlets 009, 022, 023 and 027. Notwithstanding the elevated levels of selenium you have alleged, Fola is in compliance with its WV/NPDES permit.

Id. at 2 (emphasis added). *See also id.* at 7, 12, 17, 22, and 27 (identical statements from WVDEP about each mine subject to citizen complaint).

Significantly, WVDEP did not claim that it has no recourse if permitted discharges cause violations of water quality standards for pollutants that are not specifically identified in the permit. WVDEP issued administrative orders to each mining operation about which Plaintiffs' counsel complained, requiring them to either: (1) demonstrate that its operations were not the source of the pollution at issue, or (2) apply for an NPDES permit modification to impose new permit limits. *Id.* at 4, 9, 14, 19, 24, and 29. This is exactly what the NPDES permits and the NPDES permitting rule contemplate.

While this Court has previously concluded that neither SB 615 nor WVDEP's rulemaking had any real effect, both WVDEP and the State Legislature have since taken new steps to clarify that Subsection 5.1.f does not have the effect Plaintiffs give it. In apparent response to the prior rulings of this Court, the Legislature and WVDEP have again taken formal action to clarify that existing permits do not make water quality standards self-implementing. In 2014, WVDEP

clarified its position once again by proposing to strike language from W. Va. Code R. § 47-30-5.1.f as follows:

~~5.1.f. The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2.~~
 Further, aAny activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein. However, as provided by subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

See Ex. 21 (WVDEP's proposed change to § 5.1.f).²⁵ WVDEP explained that it was proposing this clarification "as a result of the passage of Senate Bill 615" and that the clarification was "consistent with Section 402(k) of the federal Clean Water Act." Ex. 22 at 2- 3, 6-7 (forms submitted by WVDEP to WV Secretary of State with proposed rule).²⁶ The Legislature recently approved WVDEP's clarification, and that bill is currently awaiting the Governor's signature. See H.B. 2283, 82nd Leg., 1st Reg. Sess. (W. Va. 2015).²⁷ Upon the Governor's approval, Subsection 5.1.f will no longer contain the language Plaintiffs rely upon in this case and others.

Likewise, the West Virginia Legislature recently passed Senate Bill 357 ("SB 357"), which amended § 22-11-6 of the State WPCA to clarify that:

Notwithstanding any provision of this code or rule or permit condition to the contrary, water quality standards themselves shall not be considered "effluent standards or limitations" for the purposes of both this article and sections 309 and 505 of the federal Water Pollution Control Act and shall not be independently

²⁵ The full proposed rule is available at <http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9650> ("Notice").

²⁶ The full submission is available at <http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=9650> ("Agency Approved").

²⁷ The bill approving WVDEP's clarification was sent to the Governor on March 18, 2015 (*see* http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=2283&year=2015&sessiontype=RS), and he has until April 2, 2015 to sign or veto it. W. Va. Const. art. 7, § 14 (Governor has fifteen days to sign or veto bills he receives after close of legislative session).

or directly enforced or implemented except through the development of terms and conditions of a permit issued pursuant to this article.

S.B. 357, 82nd Leg., 1st Reg. Sess. (W. Va. 2015) (emphasis added).²⁸ SB 357 also amended §22-11-8 of the State WPCA to provide that:

While permits shall contain conditions that are designed to meet all applicable state and federal water quality standards and effluent limitations, water quality standards themselves shall not be incorporated wholesale either expressly or by reference as effluent standards or limitations in a permit issued pursuant to this article.

*Id.*²⁹ SB 357 was signed by the Governor on March 12, 2015 and becomes effective on June 1, 2015.³⁰ These actions remove any ambiguity that may have existed in prior actions taken by either WVDEP or the Legislature. As a result, Fola's NPDES permits unequivocally do not authorize a citizen suit to enforce water quality standards that are not embodied as express effluent limits.

C. West Virginia Law Requires Evidence of Impacts to Fish to Prove a Violation of Narrative Standards

Plaintiffs' Complaints rely solely on WVSCI scores to prove violations of the narrative water quality standards. ECF No. 39, ¶¶ 36, 37, 40 & 49; ECF 26-2, ¶¶ 40, 48, 51 & 60. WVDEP has never sought approval to use the WVSCI as a water quality standard. In order to lawfully use the WVSCI as the direct measure of compliance with the narrative standard, WVDEP would be required to following state rulemaking procedures and obtain EPA's approval. Efforts to convert narrative standards into numeric ones or to use a particular threshold as the measure of compliance with narrative standards are considered rulemaking that must comply with state rulemaking procedures. *See Simpson Tacoma Kraft v. Dept. of Ecology*, 119 Wash.2d 640, 835

²⁸ See also Ex. 23 at 5 (showing strikethroughs in bill as introduced), 12-13 (final bill as passed).

²⁹ See also Ex. 23 at 7 (showing strikethroughs in bill as introduced), 15 (final bill as passed).

³⁰ See http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=357&year=2015&sessiontype=RS.

P.2d 1030 (Wash. 1992) (invalidating state agency's attempt to translate narrative WQS into a numeric limit without following proper rulemaking procedures). *See also FPIRG v. EPA*, 386 F.3d 1070, 1082 (11th Cir. 2004) (remanding case to district court to determine whether state's mechanism for identifying impaired waters constituted changes to state's water quality standards); *Fla. Wildlife Federation v. McCarthy*, No. 8:13-cv-2084-T-23-EAJ, 2015 WL 1189946 at *1 (M.D.Fla. Mar. 16, 2015) (noting EPA determination that portions of Florida's impaired waters rule "constituted a reviewable new or revised water quality standard").³¹

The WVSCI, however, has never been promulgated and approved by the state or EPA as a rule that defines compliance with narrative water quality standards. In order for water quality criteria to become binding elements of state water quality standards, the criteria must be adopted by the state in accordance with the state's rulemaking procedures, comply with any additional applicable federal requirements on public participation in 40 C.F.R. § 25, and be approved by EPA as part of the state's water quality standards program. 40 C.F.R. §§ 131.6(e) & 131.20. Accordingly, the WVSCI cannot be used by WVDEP or this Court to define compliance with narrative water quality standards.

Additionally, after WVDEP began using the WVSCI in 2002, both WVDEP and the State Legislature have interpreted the narrative standard as allowing alterations to insects so long as fish communities persist. *See supra* p. 10. In other words, WVDEP does not consider the loss of sensitive aquatic species alone, without effects on fish, to be a violation of the narrative water quality standards. Plaintiffs' Complaints do not allege harm to the fish communities at the sites. Instead, as noted above, they rely wholly on low WVSCI scores. Even accepting Plaintiffs'

³¹ *See* Ex. 24 (Notice of Filing EPA's Determination on Referral regarding Florida Admin. Code Chapter 62-303, Identification of Impaired Surface Waters, pp. 1, 6, 8-11, *FPIRG v. U.S.*, No. 4:02-cv-408-WS) (policies that specify ambient conditions used to identify water quality limited waters are water quality standards subject to CWA requirements).

claims as true, this alone is not sufficient to establish a violation of West Virginia's narrative water quality standards. *See Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 493 (6th Cir. 2008) (In interpreting a state's water quality standard, ambiguities must be resolved "by consulting with the state and relying on authorized state interpretations[.]" (Cook, J., concurring)).

D. A Permit Condition Incorporating All Water Quality Standards as Express Effluent Limitations is Unenforceable

1. Permit Condition Would be Outside the Scope of the Clean Water Act and Not Enforceable in CWA Citizen Suit

Even if Plaintiffs' construction of § 5.1.f and Fola's permits were correct, they could not enforce the permit condition in this action. Where an approved state NPDES program has a greater scope of coverage than required by the CWA and its implementing regulations, the additional coverage is not considered part of the federally approved program. 40 C.F.R. § 123.1(i)(2). Thus, while states may include and enforce a condition in their permits that is outside of EPA's NPDES program, those conditions are not enforceable under the CWA. *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). In *Atlantic States*, the plaintiffs sought to enforce state permit requirements that were broader than the requirements of the federal CWA. *Id.* at 355. The Second Circuit held that the federal CWA citizen suit provision could not be used for this purpose:

However, state regulations, including the provisions of [state] permits, which mandate "a greater scope of coverage than that required" by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. Sec. 1365. 40 C.F.R. Sec. 123.1(i)(2).

Id. at 358.

There is no federal requirement that NPDES permits must contain a condition requiring compliance with water quality standards. *See* 40 C.F.R. §§ 123.25(15) (requiring state programs to have authority to establish the NPDES permit conditions enumerated in § 122.44) & 122.44(c)(1)(vii)(A) & (d)(2) (requiring state programs to have provisions requiring them to “derive” effluent limitations to meet water quality standards, but not requiring that all water quality standards themselves be imposed as effluent limitations). If the Court’s interpretation of § 47-30-5.1.f were correct, that provision would fall outside the scope of coverage required by the CWA and thus not be considered part of the state’s approved NPDES program. Pursuant to *Atlantic States*, such provisions are not enforceable in CWA citizen suits.

2. Imposing Liability for Fola’s Discharges of Conductivity and Sulfate Would Violate Fola’s Constitutional Due Process Rights

Furthermore, the imposition of liability here would violate Defendant’s Constitutional due process rights. “It is ‘a cardinal rule of administrative law’ that a regulated party must be given ‘fair warning’ of what conduct is prohibited or required of it. *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700 (7th Cir. 2013) (quoting *Rollins Envtl. Servs. (NJ), Inc. v. U.S. Envtl. Prot. Agency*, 937 F.2d 649, 655 (D.C.Cir.1991)); *see also U.S. v. Cinergy Corp.*, 623 F.3d 455, 458–59 (7th Cir.2010) (holding that defendant could not be sanctioned and found to have violated the Clean Air Act when it complied with regulations as codified, despite having knowledge that the EPA requested amendment of the regulations to prohibit defendant’s conduct); *U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir.1995) (“[T]he responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibly have intended, but what [was] said. If the language is faulty, the [agency] had the means and obligation to amend.”). Here, Defendant did not have “fair warning” that its conduct could be prohibited.

Private parties are entitled to rely on “duly-enacted, and therefore presumptively legitimate, statute[s]” and regulations, so long as that reliance is not unreasonable, such as when the provision is plainly unconstitutional. *Cohn v. G.D. Searle & Co.*, 784 F.2d 460, 464 (3d Cir. 1986). “In determining whether a party received fair notice, courts frequently look to the regulations and other agency guidance.” *Flambeau*, 727 F.3d at 707. Prior to this Court’s recent rulings on the issue, West Virginia law has never been interpreted in the fashion advocated by Plaintiffs. This Court’s rulings have marked a major shift in the application of the permit shield to WV/NPDES permits.

The permit shield has long been held to serve the purpose of giving permits finality. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). The permit shield provision has been a part of West Virginia’s NPDES program since it was first approved by EPA in 1982. *See supra* p. 26. Moreover, courts, including the Fourth Circuit, have consistently held that the permit shield provision protects permittees from claims that they are violating the CWA by discharging pollutants not expressly identified and limited in their permits when the discharge of the pollutant giving rise to the enforcement action was within the reasonable contemplation of the permitting authority at the time the permits were issued. *See Piney Run Pres. Ass’n v. Cnty. Commr’s of Carroll Cnty., Md.*, 268 F.3d 255 (4th Cir. 2001); *see also Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994).

E. SMCRA Prohibits Use of State Surface Mining Rules to Circumvent the Clean Water Act’s Permit Shield Provision

SMCRA’s citizen suit provision authorizes actions to compel compliance against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant

to this subchapter[.]”³² 30 U.S.C. § 1270(a). Plaintiffs allege that Fola’s discharges of conductivity and sulfate violate both federal and West Virginia’s surface mining performance standards and the terms and conditions of Fola’s WVSCMRA permit. ECF No. 39, ¶¶ 51-60; ECF No. 26-2, ¶¶ 62-71.³³ The fact that Plaintiffs characterize these claims as SMCRA claims, rather than CWA claims, does not allow them to side-step the CWA’s permit shield.

SMCRA expressly provides that nothing in the Act shall be construed as superseding, amending, or modifying any provision of the CWA, state laws enacted pursuant to the CWA, or their implementing rules. 30 U.S.C. § 1392(a)(3). This provision has long been construed to prohibit OSM from adopting effluent limits under SMCRA that are more stringent than those imposed by EPA or states under the CWA NPDES program. *See In re Permanent Surface Mining Regulation Litigation*, 627 F.2d 1346, 1366-1369 (D.C. Cir. 1980) (“[W]here the [SMCRA’s] regulation of surface coal mining’s hydrologic impact overlaps the EPA’s, the Act expressly directs that the [CWA] and its regulatory framework are to control[.]”).

Plaintiffs’ action to enforce state SMCRA rules arises under 30 U.S.C. § 1270(a)(1). SMCRA only authorizes citizens to sue “to compel compliance with this chapter . . . against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.” Thus, the premise of Plaintiffs’ SMCRA action is that they seek to compel compliance “with this chapter” (the federal SMCRA) against a mine which is allegedly

³² In *Molinary v. Powell Mountain Coal Co.*, 135 F.2d 231 (4th Cir. 1997), the Fourth Circuit authorized the use of the federal citizen suit provision to enforce state SMCRA standards. However, in light of the Fourth Circuit’s later opinion in *Bragg*, ruling that state program provisions are not federal law, there is a substantial question whether the SMCRA citizen suit provision either vests jurisdiction with this Court or allows a cause of action to enforce provisions of a state surface mining program. *See e.g., Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, 498 (3rd Cir. 1987) (noting that “SMCRA itself is not violated by an operator’s violation of a permit condition”).

³³ In both Complaints, Plaintiffs rely on a violation of a federal SMCRA rule. ECF No. 39, ¶ 57; ECF No. 26-2, ¶ 68 (citing 30 C.F.R. § 816.42). The Fourth Circuit has ruled, however, that once a state has obtained primacy, the federal rules “drop out” and are replaced by the state’s own rules. *Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275, 289 (4th Cir. 2001).

violating a rule or permit “issued pursuant to [SMCRA].” This language puts Plaintiffs between a rock and a hard place.

On the one hand, their suit necessarily seeks to compel compliance with “this chapter” (*i.e.*, SMCRA) by enforcing provisions of the State program that are considered by the statute as “arising under” SMCRA.³⁴ To the extent that the State provisions “arise under” SMCRA and their action seeks to “compel compliance with [SMCRA],” their claim necessarily seeks to use “this chapter” (*i.e.*, SMCRA) to supersede, amend or modify the permit shield provision of the CWA—a result expressly prohibited by 30 U.S.C. § 1292(a)(3). To the extent that Plaintiffs are not seeking to compel compliance with either “this chapter” or with the State mining program provisions that do not “arise under” SMCRA, Plaintiffs neither state a claim for relief nor vest this Court with jurisdiction.³⁵ Thus, having invoked the provisions of § 1270(a)(1) they cannot claim that their efforts to use SMCRA as a means to evade the CWA “permit shield” are not barred by § 1292(a)(3).

Recently, a federal court agreed that the surface mining program cannot be used to enforce water quality standards where the CWA does not provide such authority, without running afoul of 30 U.S.C. § 1392(a)(3). *See Sierra Club v. ICG Hazard, LLC*, No. 13-5086, 2015 WL 643382 at *10 (6th Cir. Jan. 27, 2015) (“To hold, in connection with the very same selenium discharges, that ICG is in compliance with Kentucky water quality-based effluent limitations for purposes of the CWA but in violation of those same water quality standards under

³⁴ *See Molinary v. Powell Mountain Coal Company*, 125 F.3d 231, 235-37 (4th Cir. 1997), (holding that State surface mining rules and permits are issued “pursuant to” SMCRA and thereby “arise under” SMCRA for purposes of similar provisions in 30 U.S.C. § 1270(f)). The Third Circuit has ruled to the contrary. *See Haydo*, discussed *infra* p. 41 n. 35.

³⁵ *Haydo v. Amerikohl Mining*, 830 F.2d 494, 497-98 (3rd Cir. 1987) (no Federal jurisdiction under 30 U.S.C. §§ 1270(a)(1) & (f) to enforce State mining rules because Congress vested States with exclusive jurisdiction to administer and enforce State programs). *See Bragg v. West Virginia Coal Ass’n*, 248 F.2d 275, 288-89 (4th Cir. 2001) (ruling that approved State programs provide States with “exclusive jurisdiction” over mine regulation and cannot be enforced as federal law against States under 11th Amendment).

[SMCRA] would create an inconsistency or conflict in regulatory practice, in direct contravention of § [1392(a)(3)].”). *See also OVEC v. Apogee*, 555 F. Supp. 2d 640, 651 (S.D. W.Va. 2008) (granting summary judgment to mining company in response to SMCRA-based claim to enforce effluent limits and water quality standards); *Sierra Club v. Powellton Coal Co., LLC*, 662 F. Supp. 2d 514, 532 (S.D. W.Va. 2009) (allowing a SMCRA citizen suit to compel compliance with effluent limitations, where CWA citizen suit is precluded, would supersede CWA in contravention of 30 U.S.C. § 1292(a)).

To the extent Plaintiffs claim that SMCRA and West Virginia’s surface mining performance standards require Defendant’s discharges to meet applicable water quality standards, Plaintiffs are seeking to enforce “effluent standards or limitations” pursuant to SMCRA that are more stringent than those applicable under the CWA. SMCRA cannot be used as a vehicle for by-passing the permit shield provided to Defendant by the CWA. Accordingly, Plaintiffs may not use SMCRA as a “backdoor” to bring CWA claims that are otherwise barred.

VI. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Defendant on all of Plaintiffs’ claims.

Respectfully submitted,

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